

HEIRS OF HOWARD ISAAC

IBLA 94-874

Decided December 9, 1998

Appeal from Decision of the Alaska State Office, Bureau of Land Management, denying reinstatement of Native allotment application F-13041.

Affirmed.

1. Alaska: Native Allotments

A request for reinstatement of a Native allotment application, which was previously rejected as a matter of law because it indicated use and occupancy postdating a state selection, must be supported by evidence demonstrating an error in the original application. The request is properly denied if the parties seeking reinstatement have tendered only an allegation by a party other than the applicant that use and occupancy had commenced before the date stated on the original application.

2. Alaska: Native Allotments--Res Judicata--Rules of Practice: Appeals: Generally

The doctrine of administrative finality dictates that once a party has availed himself of the opportunity to obtain administrative review within the Department, the party is precluded from relitigating the matter in subsequent proceedings except upon a showing of compelling legal or equitable reasons. Where BLM's rejection of a Native Allotment application was fully litigated within the Department; where there is no showing of compelling legal or equitable reasons to reopen the matter or manifest injustice; and where the applicant was afforded due process, administrative finality bars consideration of a restructured Native allotment application.

APPEARANCES: Andrew Harrington, Esq., William E. Caldwell, Esq., Alaska Legal Services Corporation, Fairbanks, Alaska, for Appellants; Regina L. Sleater, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE HUGHES

The heirs of Howard Isaac (Appellants) have appealed from the August 19, 1994, decision by the Alaska State Office, Bureau of Land Management (BLM), denying their request for reinstatement of Native allotment application F-13041, Parcels A and B. 1/

On July 13, 1970, Native allotment application F-13041 was filed with BLM on behalf of Howard Isaac pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970). 2/ The application contained a description of Parcels A and B, each embracing 40 acres and located in T. 18 N. and 19 N., R. 11 E., Copper River Meridian. The application indicated that use and occupancy had commenced on November 1, 1962.

Howard Isaac died on November 10, 1971.

On November 27, 1974, BLM issued a decision rejecting Isaac's allotment application because two selection applications by the State of Alaska, filed on April 24 and May 25, 1961, predated the date of commencement of use and occupancy stated on his application, segregating the lands he applied for. Isaac's heirs appealed. On June 26, 1975, the Board dismissed that appeal because no statement of reasons had been filed.

In Heirs of Howard Isaac (On Reconsideration), 63 IBLA 343, 345 (1982), the Board granted Isaac's heirs' petition for reconsideration and considered the appeal on its merits, affirming BLM's decision holding that no rights inured to Isaac or his heirs because his application failed to show prima facie entitlement, as it stated that use and occupancy began when the land was segregated by State selections. We also held that no hearing would be ordered because there was no allegation of use and occupancy prior to the time the land was segregated.

On July 3, 1990, 3/ Tanana Chiefs Conference, Inc. (TCC), filed "an original application and affidavit regarding" Isaac's allotment. The application was signed by Oscar Isaac, Howard Isaac's father. There were two affidavits filed in support of the request, both signed by Oscar Isaac, one dated March 28, 1986, and the other dated May 16, 1989. The application and accompanying memoranda indicated that Howard Isaac's occupancy commenced in 1957.

---

1/ Counsel for Appellants has moved to consolidate this appeal with Roselyn Isaac, IBLA 94-831. Because the facts in these cases are not identical, the cases are being disposed of by separate opinion.

We are not aware of the identify of Isaac's heirs, and will refer to them in the plural.

2/ The Alaska Native Allotment Act was repealed by the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1617 (1994), with a savings provision for applications pending on Dec. 18, 1971.

3/ The application is dated June 29, 1990, and BLM's Case File Abstract indicates that it was filed on July 3, 1990. The application was, unaccountably, not date-stamped by BLM.

On December 8, 1993, TCC filed with BLM a memorandum and a November 22, 1993, affidavit from Edward Isaac, 4/ who processed Native allotment applications for the Bureau of Indian Affairs (BIA) in 1970. TCC's memorandum stated that "Mr. Edward Isaac has \* \* \* requested that Parcels A and B of Howard Isaac's application be reinstated since his use of the land began prior to the state selections." In his affidavit, Edward Isaac stated that he worked with BIA from September through December 1970, traveling to villages and taking Native allotment applications from applicants. He stated that he would fill out the applications, that the applicants would sign their own name, and that most of them selected 40-acre lots. He then took the applications back to the BIA office where he told the staff that the applications needed to be completed. One of the applications he took was that of Howard Isaac. Edward Isaac's affidavit is silent as to how the date of initiation of occupancy was determined.

In support of their reinstatement request, Appellants submitted two affidavits by Oscar Isaac, Howard Isaac's father. The first, dated March 28, 1986, states: "I do not know who put down on Howard's application that he started using the land in November 1962, but I know it was not Howard. He was using that land long before that. He used the land ever since he was a little boy." In the second affidavit, dated May 16, 1989, Oscar Isaac asserts that Howard Isaac (who was born on July 13, 1944) used Parcels A, B, and C "since he was a little boy," and "before 1961."

In the Decision now before us on appeal, BLM adjudicated only Parcels A and B. 5/ BLM found that TCC, on behalf of Howard Isaac's heirs, attempted to create a dispute by trying to discredit a statement in Howard Isaac's application. BLM found the allegations in Oscar Isaac's affidavits insufficient to demonstrate error when making the statement regarding commencement of use and occupancy in Howard Isaac's 1970 allotment application. BLM concluded that neither TCC nor Isaac's heirs had provided "compelling legal or equitable reasons to reinstate the application." Accordingly, BLM denied the request for reinstatement. This appeal followed.

---

4/ It does not appear that Edward Isaac is any relation to Howard Isaac or Appellants.

5/ On Aug. 16, 1994, BLM issued a notice accepting as timely filed a reconstructed application for Native allotment application F-13041, Parcel C, encompassing 80 acres described as sec. 14, T. 18 N., R. 11 E., Copper River Meridian. However, BLM's Decision noted that the land in Parcel C had been conveyed to the State of Alaska on Nov. 20, 1963, and that the application therefore had to be adjudicated pursuant to the stipulations entered into in settlement of Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979) (Stipulated Procedures for Implementation of Order, filed Feb. 7, 1983, in Ethel Aguilar v. United States, Docket No. A76-271 Civil (Aguilar Stipulations)).

BLM's actions concerning Parcel C are not under review in the instant appeal.

Appellants allege on appeal that they have been deprived of any opportunity to correct an erroneous Native allotment application and that this is a circumstance which constitutes a compelling legal and equitable reason for reinstating the application. Appellants refer to Aguilar, supra, as the proper basis for adjudicating Parcels A and B. 6/ Appellants argue that, under the circumstances here, it was BLM's responsibility "to solicit an affidavit from Isaac's heirs specifying when use and occupancy actually began." (Statement of Reasons (SOR) at 6.) Appellants allege that they nonetheless undertook "to supply the relevant information, but BLM refused to entertain it in violation of" the Aguilar stipulations. (SOR at 7.) Appellants also argue that they are entitled to a hearing under Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976); that the application must be reinstated and adjudicated because it was pending on December 18, 1971; and that the State's 1961 selection was ineffective.

BLM responds that the affidavits submitted in support of the reconstructed application do not indicate that an error was made in the date for use and occupancy set forth on the original application. Hence, it maintains, no compelling legal or equitable reasons, such as violations of basic rights or the need to prevent an injustice, have been shown for readjudicating the case. BLM also contends that this case presents no issue requiring a hearing and that Howard Isaac is not an Aguilar class member since his application was not denied because the Parcels A and B were conveyed to the State of Alaska prior to the adjudication of his

---

6/ The Aguilar dispute involved a class action suit brought by various Native allotment applicants where the Department had already conveyed State title to the lands sought for allotment. Rejecting the Department's position that it had no authority to investigate the circumstances surrounding patent issuance, the District Court held that it was the Department's responsibility to make an initial determination as to the validity of the allotment claim in order to determine whether or not the Government would bear the burden of going forward with a suit to annul the patent and have jurisdiction over the application restored to the Department.

Implementation of the Court's decision in Aguilar was the subject of a subsequent proceeding. On Feb. 9, 1983, the District Court accepted stipulated procedures. Appellants cite, inter alia, paragraph 3 of the Aguilar stipulation, which provides:

"Where the merits of the application turn on whether the applicant's use and occupancy predate the commencement of the rights of the State, the BLM will examine the file. \* \* \* If the application and contents of the file indicate that the applicant's use and occupancy began after the rights of the State arose, the BLM will inform the applicant by letter of the date of commencement of the State's rights and that the application will be rejected unless the applicant files an affidavit within ninety days alleging, with particularity, specific use prior to the date on which the rights of the State arose."

application. Rather, those parcels remained under the jurisdiction of the Department and were ultimately conveyed to Native groups, not the State of Alaska.

In a reply brief, Appellants argue that a hearing is required because the file now contains "affidavits establishing that Howard Isaac began his use and occupancy earlier than 1962." (Reply at 2.)

[1] While the Department cannot adjudicate interests in land to which it does not have title (Bay View, Inc., 126 IBLA 281, 287 (1993)), the matter on appeal is not the adjudication of Appellants' right to the allotment, but of whether a closed Native allotment application could be reinstated. It is established that, where a Native allotment application has been terminated or rejected because averments on the face of the application were insufficient as a matter of law, reinstatement is not appropriate, absent clear evidence demonstrating a significant error in the application. State of Alaska (Heirs of Takak), 135 IBLA 1, 4 (1996); Lena Baker Maples, 129 IBLA 167, 170-71 (1994); Franklin Silas, 117 IBLA 358, 364 (1991) (clarified on judicial remand, 129 IBLA 15 (1994); aff'd sub nom. Silas v. Babbitt, 96 F.3d 355 (9th Cir. 1996)). The burden of proof lies with the party seeking reinstatement, and that party must submit evidence that clearly demonstrates that the original application contained a significant error. Lena Baker Maples, 129 IBLA at 171; Franklin Silas, 117 IBLA at 364; Donald Peter, 107 IBLA 272 (1989); William Carlo, Jr., 104 IBLA 277 (1988); Andrew Petla, 43 IBLA 186, 192 (1979).

In Franklin Silas, 117 IBLA at 364-65, we held that no hearing was required to determine whether to reinstate Silas' Native allotment application, and that reinstatement was not appropriate, since the initial BLM determination was based upon the applicant's declaration of material facts, which demonstrated conclusively that the application had to be rejected as a matter of law (in that the date indicated for initiation of use and occupancy postdated selection by the State), and since Silas failed to tender sufficient evidence of a significant error on the face of the original application. Those are also the facts presented by the instant appeal.

In so holding in Silas, we considered the following statement by Silas, concerning the date of commencement of use and occupancy, concluding that it was inadequate to justify reopening the matter:

My application, dated November 4, 1971, states I began to use my land in 1965. I don't know who wrote that in or why it says I began to use my land in 1965 since I had been using it all my life. I know I hunted and trapped on my own by at least 1960.

It is not uncommon for young boys of my generation to be hunting and running a small trapline independently from an early age such as 10 or 11 years old.

We observed:

The sole evidence that an error was committed when the Silas application was completed (i.e., some other date was intended) are Silas' self-serving statements that he does not know who inserted the date of the commencement of use and occupancy. His affidavit does not state that a specific person at BIA inserted that date, or even that BIA inserted it, and there is nothing in the record corroborating his assertion that when the application was completed he intended to have some other date inserted in the application. In fact, there is nothing to allow a conclusion that he did not. His intimation in his reply brief that some unnamed official in BIA may have unilaterally selected the date found on the application because that date satisfied the 5-year period is purely speculative.

Franklin Silas, 117 IBLA at 364.

We note that Appellants' March 1986 affidavit in the present case (quoted above) and Silas' statement are substantially similar. The May 1989 affidavit is no more specific. We conclude that Appellants have presented nothing in the present appeal showing error in the original application. Appellants have presented an affiant's statements relating to use and occupancy which are inconsistent with those on the original application. There is no explanation, however, why the use and occupancy dates on the original application are wrong. Indeed, the affidavit of Edward Isaac indicates some degree of regularity of procedure as to the manner in which applications were collected and processed at the time when Howard Isaac's application was collected and processed. Thus, there is no reason why the recent sworn statements by a party other than the applicant should be considered as having a higher probative value than statements made on the original application.

In these circumstances, as in Silas, no hearing was required. Pence v. Kleppe does not mandate a hearing as a matter of right whenever a Native allotment application is rejected. No Pence v. Kleppe hearing is required if, when taking the factual averments of the application as true, the application is insufficient on its face, as a matter of law, and thus affords no relief under the Alaska Native Allotment Act. In 1974, when BLM issued its decision regarding Isaac's application, it did so on the assumption that each and every averment in his application was correct. Appellants now attempt to create a dispute by claiming that a statement in his application was untrue. No issue of fact existed until Appellants claimed error in their petition for reinstatement, filed some 8 years after BLM's rejection of the original application was affirmed by this Board.

[2] We noted in Heirs of George Brown, 143 IBLA 221 (1998), that the fact that a Native allotment application had been rejected without a hearing does not, ipso facto, establish that it was "erroneously rejected." Noting that the Pence court recognized that, when rejection was premised

on a matter of law, no hearing was required, the Brown decision found that what Pence required and what section 905(a) of the Alaska National Interest Lands Conservation Act (ANILCA) authorized was the Departmental reexamination of those past cases in which an allotment application had been rejected with finality in order to determine whether or not due process was afforded. Reinstatement of applications was required only when either the minimum requirements of due process were not met or a manifest injustice would occur if the application were not reinstated.

We would affirm BLM even if we were to find Silas inapplicable. In Heirs of Howard Isaac (On Reconsideration), supra, issued subsequent to both Pence and section 905(a) of ANILCA, we stated:

Counsel for appellant contends that a hearing is required even in the absence of an allegation of use and occupancy prior to the State selection. An Alaska Native's right of selection under the allotment Act is non-alienable and is not subject to inheritance. However, where an allotment selection has been made and the applicant has fully complied with the law and the regulations and has accomplished all that is required to be done during his lifetime, the equitable right to an allotment becomes a property right which is inheritable. Thomas S. Thorson, Jr., 17 IBLA 326, 327 (1974). The application in this case, like that in Thorson, was incomplete and required amendment to make it allowable under the law. This Board held in Thomas S. Thorson, Jr., supra, that no rights inure to the estate of a deceased Native allotment applicant where the application which he filed does not show prima facie entitlement and where a basic amendment of the application would be required to conform to the law and the regulations. \* \* \* [N]o hearing will be ordered where there is no allegation of use and occupancy prior to the time the land was segregated. See Pence v. Andrus, supra at 743; John Moore, 40 IBLA 321, 86 I.D. 279 (1979).

Heirs of Howard Isaac (On Reconsideration), supra, at 345.

On an issue of law, an appeal to the Board of Land Appeals satisfies the due process requirement. Alfred G. Hoyle v. Babbitt, 129 F.3d 1377, 1386 (10th Cir. 1997); G. Donald Massey, 142 IBLA 243 (1998); Santa Fe Pacific Railroad Co., 90 IBLA 200, 220 (1986); Robert J. King, 72 IBLA 75, 78 (1983). Due process mandates the opportunity to be heard, and Appellants were given that opportunity when the Board examined his original application, found that it should be rejected as a matter of law, and that no hearing was required. Its decision became final for the Department, and no appeal was taken to the District Court.

The doctrine of administrative finality, the administrative counterpart of the doctrine of res judicata, generally precludes reconsideration of matters finally resolved for the Department in an earlier appeal. Jesse R. Collins, 146 IBLA 45 (1998); Richard W. Taylor, 139 IBLA 236,

241 (1997); Homestake Mining Co. of California, 136 IBLA 307, 317 (1996); Laguna Gatuna, Inc., 131 IBLA 169, 172 (1994). The doctrine of administrative finality dictates that once a party has availed himself of the opportunity to obtain administrative review within the Department, the party is precluded from relitigating the matter in subsequent proceedings except upon a showing of compelling legal or equitable reasons. Richard W. Taylor, *supra*; Gifford H. Allen, 131 IBLA 195, 202 (1994). Appellants now seek review of the issues addressed in the earlier decision. As discussed above, there was no manifest injustice here, and Appellants were provided with due process. As BLM held, the doctrine of administrative finality is clearly applicable.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

---

David L. Hughes  
Administrative Judge

I concur:

---

R.W. Mullen  
Administrative Judge